

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PART 5

PRESENT: Hon. BRUCE McM. WRIGHT
Justice.

Hudson River Fishermen's Assn. et al
- against -
NYC Dept. of Environmental Protection et al

INDEX NUMBER 7679/90
MOTION DATE _____
MOTION SEQ. NO. 001
TRIAL CAL. NO. _____

The following papers numbered 1 to _____ read on this motion to _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	_____
Answering Affidavits - Exhibits	_____
Replying Affidavits	_____

Upon the foregoing papers it is ordered that this motion- petition is granted to the extent indicated in the accompanying memorandum decision.

Dated JULY 11, 1990

[Signature]
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of : Index No. 7679/90
THE HUDSON RIVER FISHERMAN'S ASSOCIATION, : MOTION #36 APRIL 25, 1990
and JANE BUILDER, LEGAL ASSISTANT : ADJOURNED TO JUNE 13, 199

Petitioners, :

For A Judgment Pursuant to Article 78 of : IAS PART 5
the Civil Practice Law and Rules :

-Against- :

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and MS. MARIE DOOLEY, RECORDS :
ACCESS OFFICER, :

Respondents. :

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BRUCE McM. WRIGHT, J.

In this Article 78 proceeding, petitioner, The Hudson River Fisherman's Association ("HRFA") seeks an order pursuant to Article 6 of the Public Officers Law (the Freedom of Information Law), directing respondent the New York City Department of Environmental Protection ("DEP") to comply with HRFA's Freedom of Information Law requests. Petitioner also seeks an award of attorney's fees against the DEP.

The allegations of the petition, which reveal the long and tortuous history of the FOIL requests, may be summarized as follows:

Petitioner HRFA is a conservation organization whose primary purpose is to preserve and enhance the quality of the Hudson River and its watershed. Petitioner Jane Builder is a legal research assistant to HRFA's general counsel.

In June, 1989, Ms. Builder filed three FOIL requests with the DEP, regarding, inter alia, the water quality of the Hudson River and possible pollution being caused by sewage treatment facilities. The DEP did not respond to these requests within the five day period prescribed by Public Officers Law §89(3). Ms. Builder contacted Ms. Marie Dooley, the DEP's Record Access Officer, and was told that two of the three requests had not been received by the DEP. Ms. Dooley stated that one request, directed to the DEP's Department of Liminology, had arrived at that department, and that Ms. Builder should contact Mr. Mike Principe from Limonology to schedule a time to review the requested documentation. With respect to the two "lost requests", Ms. Builder was directed to re-submit the requests directly to Ms. Dooley; Ms. Builder re-submitted the requests on or about June 29, 1989. The DEP did not respond to these re-submitted requests within the required five day period (Public Officers Law §89(3)).

On or about June 10, 1989, Ms. Builder contacted Ms. Dooley and was advised that the requests had been received and were "being acted on." Ms. Builder also spoke with Ms. Ann

Sealey of the DEP, who told Ms. Builder "... that because HRFA is involved in separate litigation with the DEP, petitioner's requests were sent to counsel's office", and that "... because the requests were so long and she was so busy, she would be unable to supply petitioner with the requested information." (Petition, §13).

Petitioner contacted respondent several more times with respect to the status of the FOIL requests. Due to the DEP's failure to respond, petitioner filed an appeal of the DEP's "constructive denial" of her requests (Public Officers Law §89(4)(a)). On or about July 21, 1989, petitioner received from the DEP two letters acknowledging receipt of the requests and stating that the requests would be granted or denied in approximately two weeks.

By letter dated August 3, 1989, the DEP responded to petitioner's request as follows:

With respect to Item #1, respondent stated that it was preparing a response, but that it was not ready. As for Items #5, #9, #11, #13, #14, #15, #17 and #19, the DEP responded that "we are checking into this." Respondent stated that it did not have the records requested in Items #3, #10, and #12. With respect to Items #3 and #18, the DEP denied access on the ground that the draft regulations were not final agency policy or determinations, and were therefore exempt (Public Officers Law

§87(2)(g)). With respect to Item #4, petitioner was directed to contact respondent to review or receive copies. The DEP did not respond to Item #8. Finally, Items #6 and #16 were said to be very voluminous, and the DEP requested that petitioner narrow its demand.

Petitioner contacted respondent in August, 1989 and requested an opportunity to view the "voluminous" records, in an effort to narrow the scope of the demand. Petitioner also inquired as to when the items that were "not ready" or were being "checked into" would be available.

Petitioner received no further response from the DEP. On or about September 28, 1989, petitioner requested from Mr. Robert J. Freeman, the Executive Director of the Committee on Open Government, an advisory opinion on the legality of respondent's actions regarding the FOIL requests. (Public Officers Law §89(1)(b)(ii)) Mr. Freeman's advisory opinion dated October 11, 1989, noted that the DEP's failure to respond to the FOIL requests within the required five days had been a constructive denial of the requests, entitling petitioner to appeal.

In his advisory opinion, Mr. Freeman also cited case law holding that "... a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records." (Advisory Opinion, p. 3) Further, he opined, "...

the fact that the Hudson River Fishermen's Association may be involved in litigation against the Department is ... irrelevant to the duties imposed by the Freedom of Information Law." (Advisory Opinion, p. 3)

With respect to the DEP's response to petitioner that some of the requests were vague, Mr. Freeman stated that a request reasonably describes the records sought, when the agency, "... on the basis of the request, can locate and identify with particularity the specific records ..." (Advisory Opinion, p 4) Finally, the advisory opinion notes that pursuant to Freedom of Information Law §89(3), an agency is not required to create or prepare a record in response to a request. Mr. Freeman stated that a copy of the opinion would be sent to Ms. Dooley, the Records Access Officer, "[i]n an effort to enhance compliance with the Freedom of Information Law...." (Advisory Opinion, p.4)

Apparently, no further steps were taken by the DEP to comply with the requests. In November, 1989, petitioner instituted this Article 78 proceeding. Petitioner's counsel, Mr. Rich, states that in December, 1989, he was contacted by respondent's counsel, Assistant Corporation Counsel Blanche Greenfield, and a document production schedule was discussed, as well as petitioner's demand for attorneys' fees. Ms. Greenfield requested an itemized bill with respect to the fees.

Mr. Rich states that in March, 1990, Ms. Greenfield reversed her position about producing the documents, based on the DEP's "... allegation that several additional employees would have to be hired to comply with petitioner's documentation request." (Rich affirmation, ¶11) According to Mr. Rich, later that month respondent's counsel contacted him and stated that the DEP would produce the documents, if petitioner would narrow its requests. Petitioner agreed to narrow its request. However, upon being notified by respondent's counsel that the DEP would need an additional four months to comply with the limited production request, petitioner elected to press this Article 78 proceeding.

In May, 1990, respondent supplied petitioner with documents responding to two of the 19 requests, and informed petitioner that documents responding to six additional requests had become available. Mr. Rich states that on or about May 22, 1990, counsel reached an agreement that documentation not longer than 50 pages in length for any one item would be sent to petitioner and that documentation greater than 50 pages could be viewed by petitioner. Respondents also agreed to supply a list of items which would be provided and which could be viewed. In his affirmation dated June 13, 1990, Mr. Rich states that "[t]o date, petitioners have received no further communication, documentation

or information from respondents." (Reply affirmation, p. 4)
Petitioners request an award of attorney's fees pursuant to
Public Officers Law §89(4)(c).

In their answer to this petition, respondents assert that they "... have produced or will produce the documents required by law, and because the remaining documents either do not exist or fall within an exemption provision of the Public Officers Law, the petition fails to state a cause of action ..."
(Answer, §49) Respondents claim that they need not supply any records which are not in their possession or which do not exist. (Public Officers Law §§86(4), 95(1)(b)(i)). Respondents also assert that petitioner's request for the revised watershed regulations prepared by Vince Collucio (Item #3) and the most recent draft/revision of the watershed regulations (Item #8) are exempt from disclosure because these documents are not final agency policy or determinations (Public Officers Law §87(2)(g)(iii)).

Respondents conclude that they have acted lawfully and properly with respect to petitioners FOIL requests, and that petitioner's request for an award of attorney's fees should be denied on the ground that petitioners have not "substantially prevailed" in this proceeding. (Public Officers Law §89(4)(c)).

DISPOSITION

Although respondents assert that they have properly and lawfully responded to petitioners' June 29, 1989 FOIL request, the inescapable fact is that respondents did not provide the HFRA with any documentation until May, 1990. Initially, the DEP failed to respond to the requests within the five day period prescribed by Public Officers Law §89(3). Due to this "constructive denial" of their FOIL requests, petitioners filed an appeal with the DEP.

Respondents' determination of this appeal was largely unresponsive; of the 19 items requested, the DEP stated that it was "checking into" eight of the items and that three of the items were voluminous. No response was given for one of the items. The court notes that with respect to Item #4, respondents stated that the reports would be released and that the HFRA should contact one Mike Principe. However, it appears from respondents' counsel's May 3, 1990 letter that these reports were not released to petitioners until May, 1990, and petitioners have indicated that the reports supplied to them are incomplete. No indication was given as to when the items that were being "checked into" would be available. And, despite petitioners' request that they be permitted to examine the voluminous materials in an effort to narrow their requests, petitioners were not given this opportunity.

As was noted in the Advisory Opinion issued by the Committee on Open Government, a shortage of manpower is not a defense to an agency's failure to comply with the Freedom of Information Law (see Matter of United Federation of Teachers v NYC Health & Hospitals Corp., 104 Misc. 2d 623). Further, the fact that the requested records are voluminous did not excuse respondents from making these records available; this is not a basis for denying access as set forth in Public Officers Law §87(2). The FOIL does not place any limitation on a request, other than that the record be "reasonably described." (Public Officers Law §89(3)).

Further, to the extent that respondents failed to timely comply with the FOIL requests due to the fact that the DEP and the HRFA were involved in litigation, that is an unacceptable approach to a FOIL request. As the Court of Appeals held in Matter of Farbman & Sons v New York City Health & Hospitals Corp. (62 NY 2d 75), "... FOIL's mandate of open disclosure required that an agency's public records remain as available to its litigation adversary as to any other person." (62 NY 2d 75, 81).

With respect to Items #3 and #18, respondents claim that these items are exempt from disclosure pursuant to Public Officers Law §87(2)(g)(iii), on the ground that these documents

are not final agency policy or determinations. However, respondents have the burden of proving that these records fall within that exemption (Public Officers Law §87(2)). The conclusory, unbuttressed allegation that the documents are not final agency policy does not satisfy this burden. The Fourth Department's holding in Matter of Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, mot. for lv. to app. den., 48 NY 2d 706, is instructive here. In that case, a city agency denied access to documents on the ground that they were exempt pursuant to Public Officers Law §87(2)(g). The court wrote:

The thrust of the case law is clear. Since, as noted, extensive in camera review is burdensome, both the New York and Federal courts afford a full opportunity to the agency involved to avoid a court inspection by otherwise meeting its burden of proving an exemption. The agency must furnish a sufficiently detailed analysis of the questioned documents so that Special Term has an adequate basis for the exercise of its discretion and to insure that in camera inspection will be directed only in the "rare case." However, since the parties obviously have unequal knowledge of the documents sought, where the agency fails to give sufficiently detailed information with respect to the material allegedly exempt to permit the trial court to decide the issue, in camera inspection is one vehicle for protecting the rights of both.

[68 AD 2d 176, 180]

In view of respondents' failure to give a sufficiently detailed analysis as to the basis of the claimed exemption, the

court will conduct an in camera inspection of those documents.

The DEP asserts that Items #2, #10, #11, and #12 are exempt from disclosure because these documents are not possessed by the DEP. Respondents are not required to prepare a document in response to a request (Public Officers Law §89(3); Matter of Gannett Co. Inc. v. County of Monroe. 59 AD 2d 309, 313), However, if respondents have the information that is sought by petitioners, albeit not in the form of a document, but contained in books or records maintained by DEP, respondents should grant petitioners access to this information (see Matter of Gannett Co. v. County of Monroe 59 AD 2d 309, 313).

Respondents are directed to submit the documents demanded in Items #3 and #18, to the court for an in camera inspection, within 10 days after service of a copy of this order with notice of entry. Respondents are directed to comply with all other outstanding requests within 30 days after service of a copy of this order with notice of entry.

In addition, petitioners' request for an award of attorney's fees against respondents, is granted. The court has discretion to award attorney's fees to a party who has "substantially prevailed" in an Article 78 proceeding, where "the record involved was, in fact, of clearly significant interest to the general public and the agency lacked a reasonable basis in law

for withholding the record." (Public Officers Law §89(4)(c)). In view of the fact that petitioners are entitled to most, if not all of the requested documents, and respondents did not comply with any of the requests until after this litigation was commenced, petitioners have substantially prevailed in this proceeding. (see Matter of Powhida v City of Albany, 147 AD 2d 236, 239).

In opposition to the HRFA's request for an award of attorney's fees, respondents have cited Matter of Friedland v. Maloney, 148 AD 2d 814. However, the circumstances here are quite different from those that were before the Third Department in that case. In Matter of Friedland v. Maloney, supra, the FOIL request was filed in February, an Article 78 proceeding seeking an order compelling the release of the documents was commenced in April, and all of the documents were released in July, some five months after the request had been filed. In denying petitioner's request for attorney's fees, the court noted:

Respondents' evidence demonstrated that the Department commenced working on petitioner's complex request on the day it was received and was unable to sooner complete the task because of the difficulty in locating and assembling the extensive and complex records. Thus, it cannot be said as a matter of law that the Department released the documents and records because of the commencement of litigation. Petitioner failed to produce any evidence that re-

spondents did not act in good faith.

[148 AD 2d 814, 816]

Here, there is no indication in the record that respondents acted promptly to respond to the request, or that they experienced difficulty in locating the records. Although the FOIL requests were filed in June, 1989, petitioner did not receive any documents until May, 1990, some 11 months after the requests were filed and six months after this proceeding was commenced. Respondents did not even permit petitioners access to the "voluminous" records so that petitioners could narrow their requests. And, it appears that the Advisory Opinion issued by the Committee on Open Government, which was forwarded by the Committee to respondents, "[i]n an effort to enhance compliance with the Freedom of Information Law," (Advisory Opinion, p. 4), had no impact on respondents. The only conclusion to be reached is that respondents "lacked a reasonable basis in law for withholding" most, if not all of the records, (Public Officers Law §89(c)(ii), and that respondents only began to comply with an 11 month old FOIL request, after this proceeding was instituted.

Further, respondents' citation to Matter of Kline & Son, Inc v. Amsterdam Recorder, 124 Misc. 2d 701, is not persuasive. In Matter of Kline & Son, Inc., supra, the court declined to award attorney's fees to petitioner, noting that the

release of the documents came prior to the assertion of a defense to the proceeding, and that respondents had initially withheld the documents in a good faith effort to protect the confidences of an industry. There is no such demonstration of good faith in the record before this court.

Finally, this court is satisfied that the records involved are, "... in fact, of clearly significant interest to the general public." (Public Officers Law §89(c)(1)). The records, sought by a conservation organization, pertain to the quality of the drinking water supply, and possible sources of pollution. That these records are of clearly significant interest to the general public is not disputed by the DEP.

Accordingly, in the exercise of discretion, petitioners' application for an award of attorney's fees is granted. (See Matter of Powhida v City of Albany, 147 AD 2d 236; Steele v NYS Dept. of Health, 119 Misc. 2d 963). The issue of the amount of reasonable fees is referred to a Special Referee to hear and report. Petitioners are directed to serve a copy of this order upon Room 311, in order to obtain a hearing date.

The foregoing constitutes the decision and judgment of the court.

Dated: July 12, 1990



J. S. C.